

It was for the above reasons that I dismissed the Application with costs.

Application dismissed.

Solicitors: *Tan Yu & Co.; Balasundram & Co.*

PETER NG TECK JOO v. VINCENT PONNIAH

[O.C.J. (Vohrah J.) August 29, 1984]

[Kuala Lumpur – Civil Suit No. F 133 of 1983]

Contract – Sale of land – Time the essence of contract – Failure to pay agreed sum in time – Forfeiture of part payment – Specific performance – Striking out – Whether reasonable cause of action – R.H.C. 1980, O.18 r.19.

By a written agreement made between the plaintiff and the defendant, it was agreed that the plaintiff purchase a piece of land with the building thereon at the sum of \$250,000, subject to the terms and conditions therein. The plaintiff made part payment of \$25,000, and the balance of \$225,000 was to be paid as follows: (a) On or before October 30, 1982, a sum equivalent to the outstanding due for the redemption of the land from the Bank; (b) On or before November 23, 1982 the balance less sum paid under (a). Time was expressly declared to be of the essence of the contract. There was also an express term that failure to pay the balance as provided would entitle the defendant to forfeit the sum of \$25,000 and treat the agreement as null and void and of no further effect with neither party having any claim against the other.

The plaintiff failed to pay the redemption sum on or before October 30, 1982 and the defendant forfeited the sum of \$25,000. On November 6, 1982 the plaintiff tendered the cheque for the redemption sum but it was rejected by the defendant. On November 19, 1982 the plaintiff tendered 2 cheques, one for the redemption sum and the other for the balance less the redemption sum but the cheques were returned by the defendant whereupon the plaintiff sued for specific performance of the contract. The defendant applied under O. 18 r. 19, Rules of the High Court, 1980, for an order that the statement of claim be struck out and action dismissed on the main ground that the statement of claim disclosed no reasonable cause of action.

Held: (1) where time has been stipulated in an agreement expressly to be of the essence it is of primary importance and the time stipulations must be adhered to;

(2) the question of the reasonableness of the tender of the redemption sum within 5 days of the deadline is quite irrelevant. So also is the question of any requirement on the part of the defendant to give notice to the plaintiff to make payment within a reasonable time after the deadline;

(3) accordingly, the statement of claim discloses no reasonable cause of action and it must be struck out and the action dismissed with costs.

A Cases referred to:

- (1) *S. Ayadurai v. Lim Hye* [1959] M.L.J. 143.
- (2) *Jamshed Khodaram Irani v. Burjorji Dunjibhai* (1916) 43 I.A. 26; A.I.R. 1915 P.C. 83.
- (3) *Steedman v. Drinkle & Ors.* A.I.R. 1915 P.C. 94.

B CIVIL SUIT.

K.S. Narayan (C. Anandakrishnan with him)
for defendant/applicant.

T. Lee for plaintiff/respondent.

C

Cur. Adv. Vult.

Vohrah J.: This is an application under Order 18 rule 19 of the Rules of the High Court 1980 on the part of the defendant for an order that the statement of claim of the plaintiff be struck out and his action dismissed with costs on the ground that the statement of claim discloses no reasonable cause of action or that it is frivolous and vexatious or is otherwise an abuse of the process of the Court. The action is for specific performance of an agreement for the sale and purchase of land and alternatively for the return of a sum of money which was paid as consideration for the agreement and deemed as part payment of the purchase price.

The relevant facts of the case are as follows.
F The defendant is the registered owner of a piece of land held under H.S.(D) 26199 P.T. No.41145 in the Mukim of Kuala Lumpur together with a double-storeyed link house erected thereon known as No.9, Jalan Pudina, Bukit Bandaraya, Kuala Lumpur ("the property"). By an agreement dated August 4, 1982 made between the plaintiff and the defendant it was agreed that the plaintiff purchase the property from the defendant for the sum of \$250,000/- subject to the terms and conditions set out in the agreement (See Exh. VP-1, Encl. 7). The plaintiff paid a sum of \$25,000/- as deposit and part payment towards the purchase price (See **H** Clauses 1 and 5) and the manner in which the balance was to be paid was provided for by Clause 3 which reads as follows:-

I "3. The balance of the purchase price in the sum of Ringgit Two Hundred and Twenty Five Thousand \$225,000.00 shall be paid in the following manner :-

- (a) The Purchaser shall on or before October 30, 1982 pay Messrs Ng Ek Teong & Partners of Bangunan Hokkien Association, Jalan Klyné, Kuala Lumpur (hereinafter called the Vendor's solicitors) a sum equivalent to the outstanding due for the redemption of the said land from United Asian Bank Berhad.

(b) The Purchaser shall on or before November 23, 1982 pay to the said Vendor's Solicitors the balance of the purchase price less the redemption sum paid under clause (a) hereinbefore. The Vendor's Solicitors shall immediately forward the document of Title and all relevant documents to the Purchaser's Solicitors who shall then forthwith present the same for registration with the appropriate land Registry Office whereon the full balance of the purchase price would be released to the Vendor on November 30, 1982 (hereinafter referred to as 'the Completion Date')."

Time was expressly declared to be of the essence of the contract by Clause 8 which reads :-

"8. Time whenever mentioned shall be of the essence of this Agreement."

There was also an express term in Clause 5 of the Agreement that failure to pay the balance as provided in Clause 3 as set out above would entitle the defendant to forfeit the sum of \$25,000/- and treat the agreement as null and void and of no further effect with neither party to the agreement having any claim against the other. For convenience I reproduce the express term as follows :-

"5. The said sum of Ringgit Twenty Five Thousand paid under clause 1 hereof shall be deemed to be a part payment of the Purchase Price and in the event of the Purchaser failing to pay the said balance price as provided in clause 3 hereinabove it is hereby expressly agreed that the above sum shall be forfeited and thereafter this Agreement shall be null and void and of no further effect and neither party hereto shall have any claim against the other."

The plaintiff failed to make payment of the redemption sum of \$64,912.05 due to the bank on or before October 30, 1982 and the defendant accordingly on November 1, 1982 wrote to the solicitors of the plaintiff notifying them that he was forfeiting the deposit of \$25,000/- and that the agreement was null and void and of no further effect for failure to pay the redemption sum on or before the deadline (See Exh. VP-3, Encl. 7). On November 6, 1982 the defendant's solicitors received from the solicitors for the plaintiff a letter dated November 5, 1982 enclosing a cheque for the redemption sum (See Exh. VP-4, Encl. 7) but this was rejected by the solicitors for the defendant by letter dated November 8, 1982 (See Exh. VP-5, Encl. 7). On November 12, 1982 the new solicitors for the defendant wrote to the solicitors for the plaintiff for the return of the transfer documents which had been deposited with them on the ground that the transaction had been terminated (See Exh. VP-7, Encl. 7) and the solicitors for the plaintiff replied by letter dated November 19,

A 1982 denying the defendant's right to forfeit contending (a) that "Clause 5 of the Agreement specifically provides for breach of Clause 3 in whole, and not just Clause 3 sub-clause (a)"; (b) that the stipulation as to time for payment of the redemption sum was only secondary to the main purpose of the agreement; (c) that the tender of the redemption sum within 5 days was reasonable in the circumstances and there was no undue delay; and (d) that in the circumstances and "upon the terms" of the agreement the defendant was not entitled to terminate the agreement without giving the plaintiff due notice to complete performance within a reasonable period (See Exh. VP-8, Encl. 7). This letter forwarded two cheques, one for the redemption sum and the other for the balance of the purchase price less the redemption sum, and gave notice that if the defendant refused to carry out the sale the plaintiff would then seek specific performance of the agreement for the sale of the property. Both these cheques were however returned by the solicitors for the defendant through their letter dated November 23, 1982 reiterating the defendant's stand that the deposit was treated as forfeited and the agreement as null and void and of no further effect (See Exh. VP-9, Encl. 7).

The contentions referred to above form the basis of the arguments put forward by Counsel for the plaintiff in opposing the defendant's present application. The plaintiff admits that there had been a breach of Sub-clause (a) of Clause 3 and that time was of the essence of the agreement but contends that the forfeiture clause was not available to the defendant unless there was also breach of Sub-clause (b). I do not think, bearing in mind the requirement on the part of the plaintiff to do two separate acts by two separate deadlines which were in no way dependent upon each other, that I am entitled to read into the agreement the conjunction "and" between Sub-clause (a) and Sub-clause (b) so as to make these two sub-clauses cumulative in effect. Any contrary interpretation would lead to the anomalous and invidious situation where it could be argued that forfeiture would not be available to the defendant should the plaintiff have failed or refused deliberately to fulfil Sub-clause (b) after fulfilling Sub-clause (a). I, therefore, do not see the logic of requiring that the plaintiff must have failed in making both these payments within the stipulated time limits as a necessary condition for the operation of the provisions of Clause 5. Nor can I accept the bare statement of Counsel for the plaintiff that "the stipulation as to time for payment of the redemption [is]

only secondary to the main purpose of the contract" in the absence of any arguments or evidence in support of it. In the case of *S. Ayadurai v. Lim Lye*,⁽¹⁾ from which the quoted words of Counsel for the plaintiff apparently originate, there were no specific provisions similar to those in Clause 5 and Clause 8 expressly providing payment *modo prae-scripto* within a definite time-frame nor was there provision for time whenever mentioned to be of the essence of the contract. This case, in my view, is in fact authority for the converse argument that time limits must be adhered to and that equity cannot be called in aid when it is clear that the intention of the parties is that time is of the essence of the contract. This is obvious from what Ismail Khan J. in referring (at page 144) to a Privy Council case⁽²⁾ had to say:

"The local law as to time being of the essence of the contract is the same as in England. *Jamshed Khodaram Irani v. Burjorji Dunjibhai* (1915) 43 I.A. 26. Section 56(1) of our Contracts Ordinance which is the same as section 55 of the Indian Contract Act 1872 provides that

'when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before the specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract'.

Lord Haldane in the above case after referring to the Indian section said:

'Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.' ... 'Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance *may be excluded by any plainly expressed stipulation*. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prime facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law

A the contract has not been literally performed by the plaintiff as regards the time limit specified' ... 'But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract.'". (Emphasis is mine).

C In another Privy Council case, that of *Steedman v. Drinkle & Ors.*⁽³⁾, Viscount Haldane again on the question of the exercise of the Court's equitable jurisdiction in contracts where it is provided that time is to be considered as of the essence had (at page 95) this to say:-

D "Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. *But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain*. If indeed the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach." (Emphasis is mine).

F It is obvious therefore that where time has been stipulated in an agreement expressly to be of the essence it is of primary importance and the time stipulations must be adhered to. I do not think it can be doubted from the clear and express provisions of Clauses 3, 5 and 8 that both the plaintiff and the defendant agreed that time was to be of the essence and that the payments had to be effected by the plaintiff within the time limits as stipulated. The question therefore of the reasonableness of the tender of the redemption sum within 5 days of the deadline is quite irrelevant. So also is the question of any requirement on the part of the defendant to give notice to the plaintiff to make payment within a reasonable time after the deadline. I accordingly find that the statement of claim discloses no reasonable cause of action. In the event I shall allow the application by striking off the statement of claim and dismissing the action with costs.

Application allowed.

Solicitors: *Rajasooria & Son; Lee, Loo & Bakarudin.*